

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

5

SHAKESPEARE’S, INCORPORATED

10

and

CASE 18-CA-17457

GEORGE HENSON, an Individual

SHAKESPEARE’S INCORPORATED

15

and

CASE 18-CA-17458

JERRY LEE WEHDE, JR., an Individual

20

Florence Brammer, Esq. for the Government.¹
Alisa Shakespeare, President, for the Company.²

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BENCH DECISION

Statement of the Case

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WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case.³ The parties presented evidence and gave closing arguments on August 4, 2005 and on August 5, 2005, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board’s (herein Board) Rules and Regulations setting forth findings of fact and conclusions of law.

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For the reasons stated by me on the record at the close of trial, specifically including credibility determinations,⁴ I found Shakespeare’s, Incorporated, (herein Company) violated

¹ I shall refer to Counsel for the General Counsel as Government Counsel and the position she advocates as the Government’s position.

² I shall refer to the Respondent as the Company.

³ George Henson (Henson) and Jerry Lee Wehde, Jr. (Wehde) filed their charges on November 1, 2004. The Regional Director for Region 18 of the National Labor Relations Board (Board), on behalf of the General Counsel of the Board, issued an Order Consolidating Cases and Consolidated Complaint and Notice of Hearing on January 21, 2005. This case was tried in Cedar Rapids, Iowa on August 4, 2005.

⁴ Credibility resolutions have been made upon the entire record and all exhibits in the proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to

Section 8(a) (1) of the National Labor Relations Act, as amended, (herein Act) by on or about October 26, 2004, discharging its employees Henson and Wehde because they concertedly spoke with each other and fellow employees regarding pay issues, and also complained to Company President Alisa Shakespeare (Company President Shakespeare) regarding pay issues.

I concluded their actions were concerted, known to the Company, protected by the Act and was the motivating factor for their discharge. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941, (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481, (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). I concluded the Company failed to demonstrate that the same discharge action would have taken place even absent any concerted protected activity on Henson's and Wehde's part. Specifically, I concluded there was no credible evidence the Company discharged Henson and Wehde for insubordination. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899, (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,⁵ pages 237 to 261 containing my Bench Decision and I attach a copy of that portion of the transcript, as corrected, as Appendix A.

Conclusions of Law

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

Remedy

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily discharged its employees Henson and Wehde, I recommend they, within 14 days from the date of the Board's Order, be offered full reinstatement to their former jobs, or if their jobs no longer exist to substantially equivalent positions, without prejudice to their seniority, or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them with interest. Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I recommend the Company be required to expunge from its records any and all references to its unlawful discharge of Henson and Wehde and notify them in writing this has been done and their unlawful discharge will not be used against them in any manner. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). I

my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

⁵ I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attachment Appendix C.

recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate Notice to Employees, a copy of which is attached hereto as "Appendix B."

5 On these findings of fact and conclusions of law and on the entire record, I issue the following:⁶

ORDER

The Company, Shakespeare's Incorporated, its officers, agents, successors and assigns shall:

10 1. Cease and desist from:

(a) Discharging employees because they concertedly raise pay issues with the Company and in order to discourage employees from engaging in these and/or other concerted protected activities.

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(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

20 2. Take the following affirmative action necessary to effectuate the policies of the Act:

25 (a) Within 14 days of the date of the Board's Order offer George Henson and Jerry Lee Wehde reinstatement to their former jobs or if their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights or privileges enjoyed, and, make them whole for any lost wages and benefits they suffered as a result of their discharge.

30 (b) Within 14 days of the date of the Board's Order remove from George Henson's and Jerry Lee Wehde's files any reference to their unlawful discharge and within 3 days thereafter notify them in writing this has been done and that their discharge will not be used against them in any manner.

35 (c) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, Social Security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of any back pay due under the terms of this Order.

40 (d) Within 14 days after service by the Regional Director of Region 18 of the National Labor Relations Board, post at its Cedar Rapids, Iowa, facility copies of the attached Notice to Employees marked "Appendix B."⁷ Copies of the Notice, on forms provided by the

⁶ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading, "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read: POSTED

Regional Director for Region 18 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company on or at any time since October 26, 2004.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 18 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C.

William N. Cates
Associate Chief Judge

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24 This is my decision in Shakespeare's Incorporated, herein
25 company, Cases 18-CA-17457 and 18-CA-17458. The Government

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1 alleges the company by its president, Alisa Shakespeare, herein,
2 President Shakespeare, discharged its employees George Henson,
3 herein Henson, and Jerry Lee Wehde, Jr., herein Wehde, on or
4 about October 26, 2004 because they concertedly spoke with each
5 other about pay raises and raised those pay issues with
6 President Shakespeare.

7 It is alleged President Shakespeare discharged the
8 employees in question to discourage the employees from engaging
9 in these or other protected concerted activities. The
10 Government alleges the company's actions violated Section
11 8(a)(1) of the National Labor Relations Act as Amended, herein
12 Act.

13 The company is an Iowa Corporation with an office and place
14 of business located in Cedar Rapids, Iowa, where it is engaged
15 in the business of processing and packing candy products.
16 During the calendar year ending December 31st, 2004, a
17 representative period, the company derived gross revenues in
18 excess of \$500,000.00 and purchased and received at its Cedar
19 Rapids, Iowa facility goods and supplies valued in excess of
20 \$50,000.00 from suppliers located outside the State of Iowa.
21 The company stipulates the evidence establishes and I find it is
22 an employer engaged in commerce within the meaning of Section
23 2(2)(6) and (7) of the Act.

24 It is admitted that company president Shakespeare and
25 office manager/factory manager Kathryn George are supervisors

1 and agents of the company within the meaning of Section 2(11)
2 and 2(13) of the Act. The company denies it violated the Act in
3 any manner alleged in the complaint.

4 This case as in most cases requires credibility
5 resolutions. Let me state at the very beginning that in
6 arriving at my credibility resolutions I carefully observed the
7 witnesses as they testified and I have utilized such in arriving
8 at the facts herein. I have also considered each witness'
9 testimony in relation to other witness' testimony and in light
10 of the exhibits presented herein. If there is any evidence that
11 might seem to contradict the credited facts I have set forth I
12 have not ignored such evidence but rather have discredited it or
13 rejected it as not reliable or trustworthy. I have considered
14 the entire record in arriving at the facts herein.

15 Company president Shakespeare commenced the candy company
16 herein starting with just two candy processing vats or machines
17 and developed the company to its annual current sales of
18 approximately \$4 million per year. The company supplies candy,
19 pretzels and related items to such nationally known companies as
20 T. J. Maxx, Wal-Mart and Target. The company's success appears
21 directly related and attributed to the leadership of President
22 Shakespeare.

23 While perhaps not having a formally structured work
24 schedule, it appears at least in the fourth quarter of each year
25 that the company schedules work seven days per week. For a

1 period of time in 2004 portions of the work force that the
2 company relied on were provided by a temporary service type
3 company. The temporary help company, namely Cambridge, supplied
4 workers for a while but the arrangement did not prove
5 satisfactory.

6 According to president Shakespeare, she and Brad Smith, an
7 official of Cambridge, had a falling out and Smith pulled all
8 Cambridge's temporary employees from the company herein. It was
9 at that time the company hired some of the temporary employees
10 as its own employees. This change from temporary help to
11 permanent employees took place in approximately early October,
12 2004. The pertinent time period involved in this particular
13 case runs from approximately August 1, 2004 until October 26,
14 2004, a relatively short period of time.

15 Henson commenced work as a temporary employee at the
16 company herein; that is, he was employed at the company,
17 Cambridge, which provided at that time temporary employees to
18 the company. Henson started work on approximately August 4,
19 2004. He did piece rate work such as placing ten eight inch by
20 one inch pretzels in tubs and sealing the tubs for shipment to
21 Target Department Stores and other customers. It was the
22 packer's job to ensure that the pretzels were not broken or
23 damaged and that the proper number of products were placed in
24 each tub.

25 The filled tubs were then transported to the shipping rooms

1 for shipping to the customer. Henson and the others were paid
2 on a piece rate system. It is acknowledged by the company and
3 others that Henson was an excellent employee who learned the job
4 quickly and performed it well. Henson testified he was paid
5 extra by company president Shakespeare for working weekends
6 after he had already worked 40 hours as a temporary employee of
7 Cambridge.

8 At some point the company went to an hourly wage structure
9 for a brief period of time and then on or about October 15, 2004
10 went back to the piece rate system of payment. On or about
11 October 6, 2004, Cambridge pulled all of its employees from the
12 company herein. According to Henson, President Shakespeare
13 needed a second shift starting in approximately mid September
14 and asked him to be the lead person on that shift which he
15 agreed to do.

16 Henson described his team leader duties on the second shift
17 as that he would set up the work stations, clean the area and
18 get the product ready to be put into the tubs or boxes for
19 shipment. Each on the second shift worked in the same manner of
20 packing and preparing the product for shipment. Henson
21 testified he did not discipline employees, that he did not
22 assign which employees would perform what packing of products, Henson said
23 he had an incident with a temporary agency supplied employee and
24 told the employee to get back to work or he would write him up.
25 However, factory manager George told Henson that he had no

1 authority to write anyone up.

2 Henson testified that the company had a standard operating
3 practice that if a temporary supplied employee could not perform
4 the job after four hours the temporary employee was to be sent
5 home. Henson testified in his duties as team leader on the
6 second shift he had no authority to lay off or recall employees,
7 nor did he have any authority to transfer employees. Henson
8 said he had no authority to promote employees or give them a
9 wage increase. Henson testified he did not know of any
10 evaluations at the company for employees and that he was never
11 provided a job description.

12 Henson denied hiring any employees for the company but
13 acknowledged that he told president Shakespeare about his first
14 cousin, Wehde. Henson testified he told Wehde to show up at the
15 company and he introduced Wehde to company president
16 Shakespeare. Wehde was hired that day in early September, 2004
17 as a first shift packer. Henson testified he noticed problems
18 or concerns with his pay being incorrect in September, 2004.
19 Henson testified he spoke with company president Shakespeare on
20 or about September 24, 2004 regarding his pay concerns and
21 she told him she did not have time to look into it then but
22 would in the future.

23 Henson testified he thanked Shakespeare and returned to
24 work. According to Henson, all of the employees were having pay
25 problems and they talked about it during break times. Henson

1 spoke with company president Shakespeare in early October about
2 the payroll issues and she told him at that time she did not
3 have time to deal with it, that she was dealing with other
4 employees. Henson testified he again let the matter go at that
5 time.

6 Henson testified he spoke with Cambridge official Brad
7 Smith about the pay problems at the company herein. According
8 to Henson, Smith called company president Shakespeare on a
9 speaker telephone and Shakespeare said she would handle the
10 payroll problems. Henson testified his paycheck of October 10,
11 2004 was grossly underpaid. He testified his check was for
12 approximately \$260.00 and he anticipated and was expecting a
13 payroll check of approximately \$1,700.00. Henson met with
14 company president Shakespeare. He said the matter was not fully
15 corrected but that company president Shakespeare wrote him a
16 check in excess of \$1,100.00.

17 Henson testified he had problems with pay for October 5 and
18 6, 2004 from Cambridge and spoke with Cambridge official Smith
19 about it. Smith told Henson company president Shakespeare had
20 not provided Cambridge with payroll records. Henson testified
21 he and Wehde went to the local Teamsters Union hall on or about
22 October 19, 2004 to see if the union could assist them. The
23 union business agent asked them to get union cards signed by the
24 employees. Henson testified the entire second shift met with
25 the union in late October before he and Wehde were discharged on

1 October 26, 2004.

2 Henson testified he reported for work as scheduled on
3 October 26, 2004. Henson testified that when he first began the
4 work day he, Wehde and others were doing piecework
5 individually; then they commenced working as a team. Henson
6 testified that approximately 8:15 p.m. that evening, Wehde went
7 to President Shakespeare's office and spoke with her about the
8 pay concerns he had. According to Henson, Wehde later told him
9 that evening that company president Shakespeare had told Wehde
10 that he had a low priority with respect to his pay problems,
11 that perhaps after she got her master's degree and 10,000 tubs
12 of product were filled then maybe his pay issue would have a
13 priority.

14 After Wehde reported this to Henson, Henson suggested that
15 Wehde go back and speak further with company president
16 Shakespeare. However, it was discovered that company president
17 Shakespeare had already left the plant. Henson testified he
18 called company president Shakespeare on her cell phone and told
19 her that Wehde's priority was getting his pay concerns taken
20 care of. According to Henson, company president Shakespeare
21 told him it was none of his business and that Wehde should go
22 home for the night and then instructed Henson to tell Wehde he
23 was fired. Henson indicated he would not. The telephone
24 conversation ended.

25 Henson testified that a short time later factory manager

1 George came and asked that he and Wehde proceed with her to the
2 office. According to Henson, factory manager George was
3 speaking with company president Shakespeare on the phone.
4 According to Henson company president Shakespeare wanted he and
5 Wehde to either sign that they had voluntarily quit their job or
6 get off the property. Henson testified that both he and Wehde
7 could hear what company president Shakespeare was saying because
8 she was speaking very loudly into the cell phone and that it was
9 coming across so that both he and Wehde could hear what company
10 president Shakespeare was saying through factory manager
11 George's cell phone.

12 Wehde told company president Shakespeare he just wanted to
13 resolve the pay issue and according to Wehde he was told to "get
14 the fuck off her property". They did not sign the notes that
15 they had voluntarily quit their job. Henson testified he had no
16 intention of quitting or resigning his job on October 26, 2004,
17 neither did Wehde. According to Henson, no option to go back to
18 work was offered. Henson testified he telephoned factory
19 manager George on October 27 to see if he was terminated or if
20 he was to report to work. According to Henson, factory manager
21 George did not know and there was no reference made in that
22 exchange to his having voluntarily quit or to his being
23 insubordinate.

24 Henson testified that employees at the company worked most but not all Saturdays. Henson
25 testified that on Saturday October the 23rd, 2004 he was not aware of whether he needed to

1 work or not so he called in to make sure because he had been
2 drinking the night before and was not feeling too good. Henson
3 testified that around 3 p.m. on Saturday October the 23rd, 2004
4 factory manager George telephoned him that he needed to come to
5 work. Henson testified he tried to call Wehde so he could get a
6 ride to work but that he could not contact Wehde. Henson
7 testified he could not drive himself because his driver's
8 license had been suspended.

9 On Sunday October 24, 2004 Henson telephoned company
10 president Shakespeare's mother, Mary Bisinger,
11 who is a supervisor at the company and she told him he did not
12 need to come to work because everyone had that day off. On
13 Monday October 25, 2004, Henson and Wehde reported for work and
14 first worked on a shipment going to the T. J. Maxx Company.
15 Henson complained to factory manager George that it was going
16 slow and wanted to switch from packing for T. J. Maxx to some
17 other customer. Factory manager George told Henson she did not
18 want to hear about it.

19 Henson then telephoned company president Shakespeare and
20 she allowed him to switch to packing for a different customer,
21 namely Target Department Stores. Henson testified that company
22 president Shakespeare jokingly asked him on October 25, 2004
23 regarding his absence on October 23, 2004 based on his drinking
24 or "bottle flu" inquiring what was she going to have to do with
25 him.

1 Wehde testified he commenced working for the company on the
2 1st of September, 2004. He said his first cousin, Henson, and
3 Henson's sister, LaVeda, told him about the company saying it
4 was a good place to work. Wehde testified he was not hired
5 through the temporary service but rather was hired directly by
6 the company. He said he worked a very short period on the first
7 shift but that when Henson was promoted to night shift he also
8 went to that shift. Wehde testified he had pay problems with
9 his check not being for the amount it was to be, deductions were
10 not taken and child support was not taken from his pay.

11 Wehde testified he spoke with company president Shakespeare
12 on three separate occasions about his pay concerns. Wehde
13 testified he was not good at remembering specific dates but said
14 he first complained the Monday following the receipt of the
15 first paycheck he received from the company herein. Wehde
16 testified company president Shakespeare told him she was busy at
17 the time. Wehde again spoke with company president Shakespeare
18 a week later to ask if she had an opportunity to review his pay
19 concerns. According to Wehde, Shakespeare told him she did not
20 have time to do so. Wehde testified he spoke with company
21 president Shakespeare a third time about his pay concerns on
22 October the 26th, 2004.

23 Wehde testified he spoke with Shakespeare in her office at
24 around 8 p.m. Shakespeare told Wehde she had not gotten to his
25 pay concerns and that he was not on her priority list.

1 According to Wehde, Shakespeare told him that after 40,000 tub
2 orders were filled and she obtained her master's degree that his
3 problems might then be at the bottom of her concerns. Wehde
4 went back to his work area after the discussion on October 26,
5 2004, and after speaking with Henson about their pay concerns he
6 went back to Shakespeare's office to further discuss the matter
7 but she had left for the day.

8 According to Wehde, Henson telephoned company president
9 Shakespeare. Henson said Shakespeare told him
10 Wehde was fired. Wehde testified he told factory manager
11 George he supposed he should get his stuff and leave, to which
12 George nodded her agreement. Factory manager George was on the
13 telephone at the time. George asked Wehde and Henson to sign
14 letters that they had voluntarily quit their jobs. Wehde
15 testified he laughed and said he was not going to sign a letter
16 that he had resigned when he had in fact been fired.

17 Wehde testified he could hear company president Shakespeare
18 screaming for him to get off of her property. Wehde testified
19 he told company president Shakespeare all he wanted to do was
20 resolve the payroll issues, that he was not quitting.
21 Shakespeare told Wehde, according to Wehde, to "get the fuck off
22 the property". Wehde said he did not want to lose his job.
23 Wehde specifically testified he did not say he would walk off
24 the job if his payroll issues were not resolved.

25 Wehde testified that he and Henson approached Local

1 Teamsters Union representatives about the unresolved payroll
2 concerns and that all of the second shift employees met with a
3 Teamster representative about their payroll concerns. Wehde
4 specifically testified that he was not scheduled to work
5 Saturday October 23, 2004 nor Sunday October 24, 2004. He said
6 he received a message on his cell phone that weekend
7 not about his not coming in to work but if
8 he had seen Henson. The message was from factory manager
9 George.

10 Wehde specifically testified he had no scheduled meeting
11 with company president Shakespeare the weekend of Saturday
12 October 23 or Sunday October 24, 2004.

13 Factory manager George testified she put Henson in a supervisory position on second
14 shift. Henson was hired as an employee based on Henson's
15 sister's recommendation. Henson's sister worked as a rank and
16 file employee at the company. Factory manager George testified
17 payroll issues at the company were brought to company president
18 Shakespeare's attention.

19 Factory manager George explained that when the payroll
20 problems arose that company president Shakespeare would take
21 care of them as soon as she could, if not that pay period the
22 next pay period. According to factory manager George the payroll
23 issues were caused in part by the fact that Cambridge, the
24 temporary service, had pulled their temporary employees from the
25 company herein. Factory manager George testified that company

1 president Shakespeare on October 22nd, 2004, issued additional
2 paychecks on that day.

3 Factory manager George testified it was difficult to get
4 pay issues correct if piece rate sheets were not filled out by
5 the employees correctly. Factory manager George testified that
6 Henson came to her with pay concerns but she said she was not
7 involved. Factory manager George testified Henson and company
8 president Shakespeare worked out Henson's pay problems on
9 October 10, 2004, and that Henson was paid in full and that
10 everything was fine.

11 Company president Shakespeare testified that Wehde had
12 problems with his pay on two occasions. On one occasion she did
13 not have access to his records, that the payroll clerk had the
14 records locked away, and that she spoke with him about having a
15 meeting regarding his pay issues. Company president Shakespeare
16 testified that the paychecks issued by the company on or about
17 October 22, 2004 were for the pay period ending October 8, 2004.
18 She explained there were lots of problems with that pay period
19 because the temporary service had withdrawn its employees and
20 that payroll was in a mess.

21 Company president Shakespeare testified she spent from 2
22 p.m. until 7 p.m. on October 22, 2004 just writing and redoing
23 payroll checks. Company president Shakespeare testified Wehde
24 spoke with her on Tuesday October the 26th about his pay. She
25 testified she told him she didn't owe him, that he was at the

1 bottom of her list, that she had two scheduled meetings with him to
2 discuss his pay and that he did not attend either meeting. The
3 meetings she made reference to were for the weekend of October
4 23 and 24.

5 Company president Shakespeare testified she told Wehde on
6 October the 26th, 2004 that she was sick and that she would deal
7 with him the following Friday. Company president Shakespeare
8 testified Henson telephoned her and told her that at the top of
9 Wehde's priority list was getting paid and that if he didn't he
10 was going to quit and that if Wehde quit he, Henson, was going
11 to quit also. Company president Shakespeare testified she
12 telephoned factory manager George and told her that Henson and
13 Wehde were going to quit and to get them to sign something
14 stating they had voluntarily quit their job.

15 Shakespeare instructed factory manager George that Henson
16 and Wehde could go back to work or sign that they were quitting.
17 Factory manager George reported to company president Shakespeare
18 that the two were not going back to work and not signing
19 anything. Company president Shakespeare testified since the two
20 were neither going to work nor signing something that they were
21 quitting she considered that insubordination and instructed that
22 they leave the premises. Company president Shakespeare
23 specifically testified Henson and Wehde were not discharged for
24 discussing wages. She said their infraction was
25 insubordination.

1 To the extent that the company contends that Henson was a
2 supervisor within the meaning of the Act and thus not covered by
3 the Act it is helpful to address that issue first. The burden
4 of proving that an individual is a statutory supervisor rests
5 with the party asserting it. See NLRB v Kentucky River
6 Community Care, 121 S. Ct. 1861 (2001). Section 2(11) of the
7 Act defines supervisor as "any individual having authority in
8 the interest of the employer to hire, transfer, suspend, lay
9 off, recall, promote, discharge, assign, reward or discipline
10 other employees or responsibly to direct them or to adjust their
11 grievances or effectively to recommend such action if in
12 connection with the foregoing exercise of such authority is not
13 of a merely routine or clerical nature but requires the use of
14 independent judgment".

15 In NLRB v Kentucky River Community Care at 1867 the Court
16 stated Section 2(11) of the Act "sets forth a three part test
17 for determining supervisory status. Employees are statutory
18 supervisors if (1) they hold the authority to engage in 1 of
19 the 12 listed supervisory functions. (2) their exercise of such
20 authority is not of a merely routine or clerical nature but
21 requires the use of independent judgment, and (3) their
22 authority is held in the interest of the employer. NLRB v
23 Health Care & Retirement Corp. of America, 511 U.S. 571,
24 574, 114 S. Ct., 1778 (1994)."

25 I find that the record evidence does not establish that

1 Henson is a supervisor within the meaning of Section 2(11) of
2 the Act. The company appears to contend Henson is a statutory
3 supervisor because he responsibly assigned employees work and
4 recommended employees for hire. The evidence with respect to
5 assigning work reveals that Henson's decision making was at best
6 routine and did not require any use of independent judgment on
7 his part. He merely cleaned up around the machines and each of
8 the employees, himself included, packaged the product for
9 shipment to the customers.

10 With respect to the work it appears it was very repetitive
11 in nature and required little, if any, supervision. As to
12 Henson's hiring or recommending employees be hired the only
13 evidence that he had any participation in hiring was that he
14 introduced his first cousin Wehde to company president
15 Shakespeare and that Shakespeare did the hiring. It appears at
16 this company that various individuals may recommend and
17 introduce potential employees to company president Shakespeare.
18 For example Henson's sister introduced Henson to company
19 president Shakespeare and Henson's sister is an acknowledged
20 rank and file employee of the company.

21 Henson, the evidence shows, signed off on the number of
22 tubs employees on the second shift filled. However, such did
23 not involve the requisite independent judgment required to
24 establish someone as a statutory supervisor. Merely counting
25 the number of tubs that an employee filled on a particular

1 shift is not the caliber of direction that would establish one
2 to be a supervisor within the meaning of the Act.

3 In conclusion on this issue, I find the company has failed
4 to establish that Henson was a supervisor within the meaning of
5 the Act.

6 In order to find whether one has been discharged for
7 concerted protected activity it must be established first that
8 the employee or employees engaged in concerted activity and then
9 if there was concerted activity whether it was activity
10 protected by the Act. Concerted activity has its basis in
11 Section 7 of the Act. The Board in Meyers Industries (Meyers
12 I), 268 NLRB 493 (1984) remanded sub. nom. Prill v NLRB 755 F.2d
13 941 (D.C. Cir, 1985), noted that the concept of concerted action
14 has its basis in Section 7 of the Act. Section 7 of the Act in
15 pertinent part states "Employees shall have the right to self-
16 organization to form, join or assist labor organization to
17 bargain collectively through representatives of their own
18 choosing and to engage in other concerted activities for the
19 purpose of collective bargaining or other mutual aid and
20 protection".

21 The Board pointed out in Meyers I that although the
22 legislative history of Section 7 of the Act does not
23 specifically define concerted activity it does reveal that
24 Congress considered the concept in terms of individuals united
25 in pursuit of a common goal. The statute requires that the

1 activities under consideration be concerted before they can be
2 protected. As the Board observed in Meyers I "Indeed, Section 7
3 does not use the term protected concerted activities but only
4 concerted activity." It goes without saying the Act does not
5 protect all concerted activity.

6 With the above as well as other considerations in mind the
7 Board in Meyers I set forth the following definition of
8 concerted activity. "In general to find an employee's activity
9 to be concerted we shall require that it be engaged in with or
10 on the authority of other employees and not solely by and on
11 behalf of the employee himself. Once the activity is found to
12 be concerted an 8(a)(1) violation will be found if in addition
13 the employer knew of the concerned nature of the employee's
14 activity, the concerted activity was protected by the Act and
15 the adverse employment action at issue, (e.g. discharge), was
16 motivated by the employee's protected concerted activity".

17 In Meyers Industries (Meyers II), 281 NLRB 882 (1986) enfd.
18 sub. nom. Prill v NLRB 385 F2d 1481 (D.C. Cir. 1987), the Board
19 made it clear that under the proper circumstances a single
20 employee could engage in concerted activity within the meaning
21 of Section 7 of the Act. The question of whether an employee
22 has engaged in concerted activity is a factual one based on the
23 totality of the record evidence. See e.g. Ewing,
24 v NLRB 861 F2d 353 (2d Cir. 1988).

25 The Board has found an individual employee's activities to

1 be concerted when they grew out of group activity. Every
2 Woman's Place 282 NLRB 413 (1986). An employee's activity will
3 be concerted when he or she acts formally or informally on
4 behalf of the group. Oakes Machine Corp. 288 NLRB 456 (1988).

5 I am fully persuaded that Henson and Wehde discussed among
6 themselves their pay concerns and discussed their pay
7 concerns and their co-workers' pay concerns with each other
8 including every employee on the second shift. Not only did they
9 discuss their wage concerns among themselves, they also sought
10 assistance from the Local Teamsters Union with respect to
11 their pay concerns. Henson and Wehde separately and together
12 spoke on various occasions to company president Shakespeare and
13 factory manager George about their pay concerns.

14 Section 7 of the Act guarantees employees the right to engage in
15 concerted activity and it is essential for a full exercise of
16 those rights that employees be able to discuss wages and pay
17 concerns. Did the company know of the concerted nature of the
18 employees' activities? The answer is yes. The
19 company acknowledges there were payroll problems during the
20 period from August 1 through and including
21 October 26, 2004.

22 Company president Shakespeare knew and discussed those
23 payroll problems with Henson, Wehde and others. The "and
24 others" is included because Shakespeare herself testified that
25 she spent several hours on October the 22nd, 2004 listening to

1 employees' payroll problems and adjusting them by handwriting
2 checks on that day. I think it is clear already from the case
3 law cited that discussing wages and addressing pay concerns is
4 concerted activity that is protected by the Act.

5 Was the adverse action, that is the discharge of Henson and
6 Wehde, motivated by their concerted protected activity? Here is
7 where credibility must be addressed. The Government contends
8 that Henson and Wehde, based on their testimony, were discharged
9 because they discussed among themselves and with management
10 their pay concerns. The company, through company president
11 Shakespeare, contends that it was not the pay concerns that
12 brought about the demise of Henson and Wehde but rather that
13 they engaged in insubordination and it was their insubordination
14 that brought about their termination.

15 I credit Henson's and Wehde's testimony with respect to their
16 conversations with factory manager George and company president
17 Shakespeare regarding their pay issues. Henson and Wehde
18 impressed me as credible witnesses and there is no dispute that
19 there was payroll problems. It is also without dispute that
20 Henson for example had specific payroll problems that company
21 president Shakespeare recognized and attempted on occasion to
22 correct.

23 I am unwilling to credit factory manager George's
24 testimony that might be in contradiction with this testimony
25 because factory manager George appeared uncertain with respect

1 to her testimony and needed to have her testimony summarized by
2 company president Shakespeare as she questioned her and then
3 have factory manager George agree with it. I am unwilling to
4 credit company president Shakespeare's testimony on the
5 circumstances regarding her discussing pay concerns with
6 Henson and Wehde because I am persuaded company president
7 Shakespeare, as is acknowledged, brought this company from nothing
8 to the vast organization it is today and she impressed me as
9 someone who does not wish to have anyone question her authority
10 or management skills.

11 Specifically I credit Henson's testimony that company
12 president Shakespeare told him when he raised wage pay concerns
13 with her that Wehde could go home and then told Henson to tell
14 Wehde he was fired. I credit the testimony that Henson and
15 Wehde talked with company president Shakespeare directly and
16 through factory manager George's cell telephone on October the
17 26th regarding their pay concerns.

18 I credit Wehde's testimony that he told company president
19 Shakespeare that he just wanted to resolve the pay issues and
20 that she responded for them to "get the fuck off the property".
21 I credit Henson's and Wehde's testimony that they were not given
22 an option of returning to work but were rather ordered off the
23 property. The connection between Henson's and Wehde's concerted
24 protected activity and their discharge was clearly established
25 by the Government through the testimony of Henson and Wehde.

1 The evidence as credited indicates the two were discharged
2 specifically for discussing pay concerns and issues with company
3 president Shakespeare.

4 Having found that, did the company demonstrate that it
5 would have taken the same action it did even in the absence of
6 any concerted protected activity on their part? In Wright Line
7 251 NLRB 1083 (1980), enfd. 662 F2d 899 (1st Cir. 1981), cert
8 denied 455 U.S. 989 (1982), approved in NLRB v Transportation
9 Management Corp. 462 U.S. 393 (1983), the Board set forth its
10 causation test for cases alleging violations of the Act that
11 turn, as does the case herein, on employer motivation.

12 First, the Government must persuade the Board the
13 employees' concerted protected activity was a substantial or
14 motivating factor in the challenged employer conduct or
15 decision. Once this is established the burden then shifts to
16 the employer to prove its affirmative defense that it would have
17 taken the same action it did even if its employees had not
18 engaged in protected activity. See Manno Electric, Inc. 321
19 NLRB 278 fn 12 (1996).

20 I am fully persuaded that the company's asserted reason for
21 discharging Henson and Wehde is an after the fact brought forth
22 justification. Simply stated I am persuaded that company
23 president Shakespeare's assertion that it was the employees'
24 insubordination that brought about their discharge is simply
25 false. The credible evidence fails to establish that they were

1 insubordinate. They were not given an option of returning to
2 work. They were ordered to get off the property when they
3 sought to discuss their pay concerns.

4 I find the discharge of Henson and Wehde violates Section
5 8(a)(1) of the Act. I shall recommend that they be offered
6 reinstatement, be made whole to include any back pay owed to
7 Henson and Wehde. I shall direct that the company expunge from
8 its records any notation of their wrongful discharge and notify
9 Henson and Wehde in writing that their employment records have
10 been expunged and that their unlawful discharge will not be used
11 against them in any way.

12 I also will order that the company post an appropriate
13 notice regarding the unlawful conduct it engaged in so that its
14 employees may know that they have rights protected by the
15 National Labor Relations Act.

16 In approximately ten days, the court reporting service will
17 provide me with a copy of the transcript of this proceeding. I
18 will take those pages of the transcript that constitute my
19 decision, make any corrections that are necessary thereon and
20 make any additional comments I deem appropriate and attach a
21 proper notice, and I will serve that certification of my bench
22 decision on the parties. Any review sought of my decision
23 should be taken following the Board's specifically outlined
24 rules and regulations.

25 Mr. Court Reporter, I thank you for being here and taking

1 down the proceeding. It has been a pleasure being in Cedar
2 Rapids, Iowa and this trial is closed.
3 (Proceeding concluded at 9:07 a.m.)
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APPENDIX B

**NOTICE TO EMPLOYEES
Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they concertedly raise pay issues with us.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer George Henson and Jerry Lee Wehde full reinstatement to their former jobs or if their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights or privileges previously enjoyed; and, **WE WILL** make them whole for any loss of earnings and other benefits resulting from their discharge less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the discharge of George Henson and Jerry Lee Wehde, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their discharge will not be used against them in any manner.

SHAKESPEARE'S INCORPORATED
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

330 South Second Avenue, Towle Building, Suite 790, Minneapolis, MN 55401-2221
(612) 348-1757, Hours 8: a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGION'S COMPLIANCE OFFICER, (612) 348-1770

APPENDIX C

Page 1

PAGE(S)	LINE(S)	DELETE	INSERT
237	1-22	Delete entire lines	
237	25	17437	17457
241	22	“what” before “employees”	which
241	22	to	would
241	22	“,”	. Henson said
241	25	him	Henson
242	20	the 24th	24
245	25		October 23, he did not know if he was to
246	1	and	so
246	10	B-I-S-I-N-G-E-R	
247	18	had	
248	3	his	her
248	9	and	“.”
248	9	told	said
248	9	--	
248	9	“Shakespeare” after “him”	
249	2	“the” after “with”	a
249	6	about not	
249	7	coming in to work--	
249	12		New paragraph before “Factory”
251	1		“him” after “with”
251	4	22 and 23 – correction, October	
251	13	was	were

APPENDIX C

Page 2

PAGE(S)	LINE(S)	DELETE	INSERT
251	20	sign	singing
252	18	one.....one	(1).....1
252	19	twelve..... two	12(2)
252	21	three	(3)
252	23	And Corporation	& Corp.
253	3	assigns	assigned
253	4	recommends	recommended
253	25	had	
254	4		“ ” ” “after activity.”
255	5	“ ” ”	
255	15	that is discharge	(e.g. discharge)
255	23	for example	e.g.
255	23	E-W-I	
255	24	N-G	
256	1	grow	grew
256	6	as well as discussing	and discussed
256	10	out	
256	14		“engaged in” after “to”
256	18	to that question	
256	19	That	
256	20	Involved herein covering	From
257	8		“,” after “Wehde” and “testimony”
257	10		“,” after “company”
257	11		“,” after “Shakespear”

APPENDIX C

Page 3

[illegible]

